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STATE OF MONTANA

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LT. GOVERNOR

MEMORANDUM

TO: David Ewer, Budget Director  
FROM: Ann Brodsky, Legal Counsel *AB*  
DATE: March 5, 2007  
RE: Legal Issues Raised by the Use of Multiple House Budget Bills

QUESTION PRESENTED:

Since 1977, the Montana legislature has adopted a general appropriations bill, in recent years enumerated House Bill ("HB") 2, to fund state government over the succeeding biennium. Recently, House Republicans introduced multiple budget bills, HBs 804 to 809, which are intended to replace the general appropriations bill, HB 2, introduced this session and considered by Joint Appropriations-Finance Subcommittees for a month and a half, but tabled in the House Appropriations Committee on February 14.

You asked me to provide you with my opinion as to the legal issues, including constitutional issues, that are raised by the legislature's consideration of multiple appropriations bills, rather than a single general appropriations bill to fund the operation of state government. This memo addresses various legal issues I have identified concerning the content of those bills. Generally speaking, it does not address any legal issues regarding the process by which the bills will be heard, debated, and acted upon by the legislature.

SHORT ANSWER:

It is my opinion that all six appropriations bills, HBs 804 through 809, are general appropriations bills. It is my further opinion that they all contain substantive law changes that are not appropriations, in contravention of Article V, section 11(4) of the Montana Constitution. The substantive law changes sought in HBs 804 through 809 must be enacted through a "single subject" bill, not a general appropriations bill.

## **ANSWER:**

### **Introduction**

Two provisions of the Montana Constitution are paramount in any appropriations bills considered by the Legislature. First, Article VIII, section 9, requires that the legislature enact a balanced budget. That section provides:

**Section 9. Balanced budget.** Appropriations by the legislature shall not exceed anticipated revenue.

Mont. Constit. Art. VIII, sec. 9.

Obviously, the use of multiple appropriations bills in lieu of a single appropriation bill could pose logistical problems in ensuring this constitutional provision is satisfied. However, it is premature to speculate as to the ultimate outcome of the multiple bills and, therefore, whether the bills will satisfy the constitutional requirement of a balanced budget. In other words, at this early stage, it is my opinion that the problems associated with the legislature's ability to comply with the balanced budget constitutional requirement while using multiple appropriations bills to adopt a state budget, rather than a single appropriation bill, are more practical than legal.

Second, Article V, section 11 establishes constitutional limits on the contents of all bills considered and passed by the legislature, including appropriations bills. The focus of my analysis involves compliance with that constitutional provision, which provides in full:

**Section 11. Bills.** (1) A law shall be passed by bill which shall not be so altered or amended on its passage through the legislature as to change its original purpose. No bill shall become law except by a vote of the majority of all members present and voting.

(2) Every vote of each member of the legislature on each substantive question in the legislature, in any committee, or in committee of the whole shall be recorded and made public. On final passage, the vote shall be taken by ayes and noes and the names entered on the journal.

(3) *Each bill, except general appropriation bills and bills for the codification and general revision of the laws, shall contain only one subject, clearly expressed in its title.* If any subject is embraced in any act and is not expressed in the title, only so much of the act not so expressed is void.

(4) *A general appropriation bill shall contain only appropriations for the ordinary expenses of the legislative, executive, and judicial branches, for interest on the public debt,*

*and for public schools. Every other appropriation shall be made by a separate bill, containing but one subject.*

(5) No appropriation shall be made for religious, charitable, industrial, educational, or benevolent purposes to any private individual, private association, or private corporation not under control of the state.

(6) A law may be challenged on the ground of noncompliance with this section only within two years after its effective date.

Mont. Constit. Art. V, sec. 11. (emphasis added).

The emphasized language in subsections (3) and (4) of the foregoing constitutional provision are reenactments, with only minor and insignificant changes, of two separate sections of the 1889 Constitution. Specifically, subsection (3) of Article V, section 11 in the new constitution is a reenactment of the following provision from the 1889 Montana Constitution:

No bill, except general appropriation bills, and bills for the codification and general revision of the laws, shall be passed containing more than one subject, which shall be clearly expressed in its title . . . .

1889 Mont. Constit. Art. V, sec. 23.

Similarly, subsection (4) of Article V, section 11 in the 1972 Constitution essentially is a reenactment of a different provision from the 1889 Montana Constitution:

The general appropriation bills shall embrace nothing but appropriations for the ordinary expenses of the legislative, executive, and judicial departments of the state, interest on the public debt and for public schools. All other appropriations shall be made by separate bills, each embracing but one subject.

1889 Mont. Constit., Art. V, sec. 33.

From the text of the constitutional provisions, the following rules relevant to the analysis of the multiple appropriations bills emerge: 1) all bills except general appropriations bills (and bills for the codification and general revision of the laws, not at issue here) may contain only one subject; 2) a general appropriations bill may contain multiple subjects, but it may contain only appropriations for the ordinary expenses of the state.

The Supreme Court of Pennsylvania provided a comprehensive explanation of the checks sought to be achieved through that state's like constitutional provisions<sup>1</sup> in the case of *Hospital and Healthsystem Association v. Department of Public Welfare*, 888 A.2d 601 (Pa. 2005):

Article III, Section 11 is one of several provisions in the Constitution detailing the legislative appropriation powers of the General Assembly. Because legislative measures setting forth appropriations are necessarily omnibus, such bills are exempted from Article III, Section 3's single subject requirement, which specifies that "[n]o bill shall be passed containing more than one subject . . . except a general appropriation bill . . ." Pa. Const. Art. 3, § 3. The historical interplay of these provisions and their purposes was eloquently set forth in this Court's prior decision in *Commonwealth v. Barnett*, 199 Pa. 161, 48 A. 976, 977 (1901), as follows:

"Bills, popularly called 'omnibus bills,' became a crying evil, not only from the confusion and distraction of the legislative mind by the jumbling together of incongruous subjects, but still more by the facility they afforded to corrupt combinations of minorities with different interests to force the passage of bills with provisions which could never succeed if they stood on their separate merits. So common was this practice that it got a popular name, universally understood, as 'logrolling.' A still more objectionable practice grew up, of putting what is known as a 'rider' (that is, a new and unrelated enactment or provision) on the appropriation bills, and thus coercing the executive to approve obnoxious legislation, or bring the wheels of the government to a stop for want of funds. These were some of the evils which the later changes in the constitution were intended to remedy. Omnibus bills were done away with by the amendment of 1864 that no bill shall contain more than one subject, which shall be clearly expressed in the title. But this amendment excepted appropriation bills, and as to them the evil still remained. The convenience, if

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<sup>1</sup> Article III, section 3 of the Pennsylvania Constitution provides: "No bill shall be passed containing more than one subject, which shall be clearly expressed in its title, except a general appropriation bill or a bill codifying or compiling the law or a part thereof."

Article III, section 11 provides: "The general appropriation bill shall embrace nothing but appropriations for the executive, legislative and judicial departments of the Commonwealth, for the public debt and for public schools. All other appropriations shall be made by separate bills, each embracing but one subject."

not the necessity, of permitting a general appropriation bill containing items so diverse as to be fairly within the description of different subjects was patent. The present constitution meets this difficulty--First, by including all bills in the prohibition of containing more than one subject, except 'general appropriation bills' (article 3, § 3); secondly, by the provision that 'the general appropriation bill shall embrace nothing but appropriations for the ordinary expenses of the executive, legislative, and judicial departments of the commonwealth, interest on the public debt, and for public schools; all other appropriations shall be made by separate bills each embracing but one subject. . . .”

*Id.* at 608-09. Quoting another Pennsylvania case, the court continued:

“It is apparent, then, that Article III, Section 11 was intended to *restrict* the power of the legislature as a trade-off for the provision in Article III, Section 3 which excludes a general appropriation bill from the single subject requirement. Because a general appropriation bill of necessity contains multiple subjects, the Article III, Section 3 exclusion was a practical necessity. However, the potential for legislative abuse was limited by requiring that such bills contain *only* appropriations . . . .”

*Id.* at 609 (citation omitted) (emphasis in original). These constitutional provisions found in the Montana and Pennsylvania constitutions are common among state constitutions. I believe it is fair to say that the statement by the Pennsylvania court as to the policies behind that state’s constitutional provisions fairly express the policies contained in many other state constitutions, including Montana’s.

The following constitutional questions arise from the introduction of HBs 804 through 809:

1. Are those bills general appropriations bills or single subject bills?
2. If they are general appropriations bills, may the legislature enact multiple general appropriations bills?
3. If yes, what extraneous material, if any, other than “appropriations” may be included in the general appropriations bills?
4. If they are not general appropriations bills, what constitutes a single subject?

## ANALYSIS

### 1. Are HBs 804 through 809 general appropriations bills?

It is my opinion that HBs 804 through 809 contain appropriations for the ordinary expenses of the legislative, executive, and judicial branches of government and are general omnibus appropriations bills as contemplated by Article V, section 11(4) of the 1972 Montana Constitution. A summary of the bills follows:

- HB 804 appropriates money to the Legislative Branch, Consumer Council, Judiciary, Governor's Office, Secretary of State, Commissioner of Political Practices, Office of State Auditor, Departments of Transportation, Revenue, and Administration, the Montana Consensus Council, and the Office of the State Public Defender.
- HB 805 appropriates money to the Departments of Fish, Wildlife, and Parks, Environmental Quality, Livestock, Natural Resources and Conservation, Agriculture, and Commerce.
- HB 806 appropriates money to the Crime Control Division, Department of Justice, Public Service Commission, Departments of Corrections, Labor and Industry, and Military Affairs.
- HB 807 appropriates money to the Montana University System and Community Colleges.
- HB 808 appropriates money to the Department of Public Health and Human Services.
- HB 809 appropriates money to the Office of Public Instruction, Board of Public Education, Montana School for the Deaf and Blind, Montana Arts Council, Montana State Library Commission, and the Montana Historical Society.

To a large extent, the bills are patterned after HB 2, which was tabled. No one disputes that HB 2 was a general appropriations bill. Whereas HB 2 contained sections A through E, appropriating money to various categories of government, HBs 804 through 809 follow the identical breakdown, with the exception that the education section of HB 2, section E, is divided into separate higher education and K-12 bills, HBs 807 and 809, respectively. Otherwise, HB 804 appropriates money to the same agencies to which money is appropriated in section A of HB 2 (general government and transportation); HB 805 appropriates money to the same agencies to which money is appropriated in section C of HB 2 (natural resources and commerce). Likewise, HB 806 corresponds to section D of HB 2 (corrections and public safety); and HB 808 corresponds to section B of HB 2 (health and human services). Each of these new appropriations bills contains multiple items of appropriation, as did HB 2 (ranging from 30 to 94 line items of appropriation in HBs 807 and 809, respectively, excluding totals).

As indicated, above, the text of the Montana Constitution contemplates the “ordinary expenses” of government shall be enacted through the general appropriations bill, which may contain multiple subjects, and other expenses will be enacted through separate single subject bills. Mont. Constit. Art. V, section 11(4). The Montana Supreme Court defined “ordinary expenses” of government in the case of *Miller Insurance Agency v. Porter*, 93 Mont. 567, 20 P.2d 643 (1933). There, the court stated: “Any expense which recurs from time to time and is to be reasonably anticipated as likely to occur in order for the proper operation and maintenance of the departments of the state government is an ordinary expense.” *Id.* at 571-72, 20 P.2d at 645. In a later decision, *Cornwall v. State*, 231 Mont. 58, 752 P.2d 135 (1988), the court clarified that ordinary expenditures need not always be ongoing, and that one-time-only purchases could be regarded as ordinary expenditures within the meaning of the constitutional language. (The case concerned the purchase of property for the Montana Law Enforcement Academy.)

It is my opinion that HBs 804 through 809 are general appropriations bills within the meaning of Article V, section 11(4) of the Montana Constitution. For purposes of this analysis, they are no different than HB 2, after which they were modeled, except that each section of HB 2 is its own individual bill. Each bill contains multiple items of appropriation for the biennium. Each contains multiple subjects, as permitted under the constitution only for general appropriations bills (and bills for the codification and general revisions of the laws, not at issue here). The items of appropriations in all six bills are for the “ordinary expenses” of the legislative, executive, and judicial branches. With the exception of HB 808 (appropriating money to DPHHS), and arguably HB 807 (appropriating money to the University System), the bills appropriate money to numerous agencies of state government.

My opinion is the same for HBs 807 and 808 as it is for HBs 804 through 806 and 809. Combined, these two bills fund numerous programs, covering a broad array of services, through over one hundred line items. Indeed, combined, HBs 807 and 808 appropriate one third of the general fund appropriations for the coming biennium. They provide for the “ordinary expenses” of health, human services, and the university system, and are *not* miscellaneous “other appropriations” for extraordinary expenses. They, like the others, are omnibus, general appropriations bills within the meaning of Article V, section 11(4) of the 1972 Montana Constitution.

2. If HBs 804 through 809 are general appropriations bills, may the legislature enact multiple general appropriations bills?

It is my opinion that the Montana Constitution does not contemplate or require that there be a single general appropriation bill. Article V, section 11(4) refers to “a” general appropriation bill, not “the” general appropriation bill. As explained above, this provision in Montana’s new constitution was the reenactment, almost verbatim, of Article V, section 33 of the 1889 Constitution, which addressed “the *general appropriation bills* . . . .” Likewise, Article V, section 23, of Montana’s 1889 Constitution, after which subsection (3) of Article V, section 11

of the 1972 Constitution was modeled, spoke of “general appropriation *bills*.” (Emphasis added.)

Additionally, as a matter of practice prior to the enactment of the 1972 Montana Constitution, the legislature appropriated money for the general operation of state government through the enactment of multiple appropriations bills, similar to the approach proposed in HBs 804 through 809 now. For example, in 1969, HB 590 (Laws 1969, p. 1124) appropriated money to various state boards and commissions); HB 596 (Laws 1969, p. 1128) appropriated money to various state institutions; and HB 599 (Laws 1969, p. 1142) appropriated money to the units of the Montana University System, among others. I am aware of nothing in the transcript of the constitutional convention that indicates an intent to limit this practice. Rather, debate indicates the delegates’ intent to carry forward the 1889 provisions without change in their purpose. For example, the only discussion of what is now Art. V, sec. 11(4), was from Delegate Nutting, who stated: “[E]ssentially, it is the same section.” Verbatim tr., Mont. Const. Conv., Vol. IV at 659 (referring to Article V, section 33 of the 1889 Constitution that general appropriation bills shall contain only appropriations for the ordinary expenses of the state and all other appropriations shall be made by separate bills). Similarly, when discussing the governor’s item-veto authority, Delegate Joyce explained:

This section preserves the current line-item veto that’s in the Montana Constitution, the idea being that general appropriations *bills* go through with more than one item in there. There may be a hundred different appropriations.

Verbatim tr., Mont. Const. Conv., Vol. IV at 956 (emphasis added).

Thus, not only does Montana’s 1972 Constitution not foreclose the enactment of multiple general appropriations bills, the delegates to the 1972 constitutional convention anticipated the practice of enacting multiple general omnibus appropriations bills would continue.

3. As general appropriations bills, what extraneous material, if any, other than “appropriations” may be included in HBs 804 through 809?

Having concluded that the multiple appropriations bills are all general appropriations bills within the meaning of Article V, section 11 of the Montana Constitution, the next question is whether the additional provisions of the bills are permissible. It is my opinion that the amendments made to existing sections of the Montana code in HBs 804 to 809 constitute changes to substantive law, that is, changes to the policy determination that the legislature has made on numerous occasions, through the enactment of these statutes, that there shall be but one general appropriations bill. The constitution does not permit inclusion of these amendments to existing law in the general appropriations bills under consideration.

To repeat, the Montana Constitution provides:



A general appropriation bill shall contain *only appropriations* for the ordinary expenses of the legislative, executive, and judicial branches, for interest on the public debt, and for public schools.

Mont. Constit. Art. V, sec. 11(4) (emphasis added).

In addition to appropriating money to the various agencies, HBs 804 through 809 contain other provisions. For example, sections 1 through 5 of HBs 804 through 809 are virtually identical to each other and to sections 2, 4, 5, 6, and 8 of HB 2, introduced this session. These sections address first level expenditures, establish appropriation controls, adopt a statutory definition of the term “program” for the appropriations, and set requirements for the presentation of personal services in the coming biennial appropriations bill. Additionally, HBs 804 through 809, like HB 2, each contain a severability section and an effective date section.

In addition to these administrative provisions, HBs 804 through 809 each contain amendments to existing statutes. Specifically, each bill amends Mont. Code Ann. §§ 15-1-122, 17-1-507, 17-7-123, 17-7-131, 17-7-138, 17-7-139, 17-7-140, 17-7-301, 17-7-304, and 90-4-614. These amendments to current law eliminate existing statutory references to “*the* general appropriations act” and “*the* budget bill” (emphasis added), in an apparent effort to conform existing law to the approach being proposed, that of adopting multiple appropriations bills. *See also* amendments in HB 807 to Mont. Code Ann. §§ 20-15-310 and 20-25-428; amendments in HB 808 to Mont. Code Ann. §§ 52-2-710, 53-2-217, and 53-6-1020; and amendments in HB 809 to Mont. Code Ann. § 20-9-542 (all eliminating the statutory references to “the” or “a” general appropriations act or bill).

HB 805 additionally amends Mont. Code Ann. §§ 17-5-502 and 85-1-220 by establishing a statutory appropriation for a Broadwater hydropower facility, the Broadwater-Missouri diversion project, and state-owned water projects.

HB 807 amends Mont. Code Ann. §§ 17-7-102 and 17-7-142, 20-15-310, and proposes two new sections of substantive law. The new sections encourage the university system to promote credit transferability and distance learning. Amendments to 17-7-102 and 17-7-142 incorporate the two new sections within existing definitions of “base budget” and “present law base.”

To summarize, by and large, the amendments to existing statutes throughout HBs 804 through 809 eliminate all current statutory references to the general appropriations act and the budget bill, so as to conform existing Montana law to HBs 804 to 809, which would fund state government through multiple appropriations bills. The other substantive law changes include a statutory appropriation and a direction to the University System to encourage credit transferability and distance learning.

The constitutional question presented is whether the extraneous provisions in HBs 804 to 809 are permissible under the requirement that “[a] general appropriation bill shall contain only

appropriations. . . .” Mont. Constit. Art. V, sec. 11(4). Two Montana cases, in particular, have analyzed this constitutional restriction, one under the 1972 Constitution and the other under the 1889 Constitution.

In *State ex rel. Davidson v. Ford*, 115 Mont. 165, 141 P.2d 373 (1943), relators, on constitutional grounds, challenged a 1943 appropriations bill, HB 151, because they objected to changes being made to the method by which funds would be distributed to soldiers, which method they claimed had been established by Chapter 105, Laws 1919. The court rejected their argument, stating: “So long as *incidental provisions* of an appropriation bill are germane to the purposes of the appropriation it does not conflict with any constitutional provision.” *Id.* at 171, 141 P.2d at 376 (emphasis added).

The court went on to quote, with approval, language from a New Mexico case:

“To sustain the contention that the general appropriation bill should contain nothing, save the bare appropriations of money, and that *provisions for the expenditure of the money, or its accounting*, could not be included therein, . . . would lead to results so incongruous that it must be presumed that the framers of the Constitution had no such intent in the adoption of the restrictions referred to. . . .

. . . . What valid objection can be interposed to such a course, *so long as the Legislature confines the incidental provisions to the main fact of the appropriation, and does not attempt to incorporate in such act general legislation, not necessarily or directly connected with the appropriation legally made*, under the restrictions of the section in question?”

*Id.* at 172, 141 P.2d at 376-77 (emphasis added) [quoting *State ex rel. Lucero v. Marron*, 17 N.M. 304, 314-16, 128 P. 485, 488-89 (1912)<sup>2</sup>].

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<sup>2</sup> The *Lucero* court quoted Article IV, section 16 of the New Mexico Constitution, which it was interpreting: “Sec. 16. The subject of every bill shall be clearly expressed in its title, and no bill embracing more than one subject shall be passed except general appropriation bills and bills for the codification or revision of the laws; but if any subject is embraced in any act which is not expressed in its title, only so much of the act as is not so expressed shall be void. General appropriation bills shall embrace nothing but appropriations for the expense of the executive, legislative and judiciary departments, interest, sinking fund, payments on the public debt, public schools, and other expenses required by existing laws; but if any such bill contain any other matter, only so much thereof as is hereby forbidden to be placed therein shall be void. All other appropriations shall be made by separate bills.”

It is not clear from the court's ruling which constitutional provision it was addressing, the single subject provision found at Article V, section 23 of the 1889 Constitution, or the provision limiting the contents of a general appropriations bill to only appropriations, found at Article V, section 33. (The confusion is compounded by the fact that the New Mexico Constitution combines the substance of both provisions in one section. *See* footnote 3, *supra*.) Regardless, the gist of the court's holding, including its strong endorsement of the New Mexico decision, is that incidental provisions necessary to the primary intent of a general appropriations measure are permissible, but that general legislation not necessarily or directly connected with the appropriation are not.

In the more recent case of *Cobb v. Schweitzer*, Montana's first judicial district court addressed the subject of what may be contained in a general appropriations bill. The lawsuit followed Governor Schweitzer's item vetoes of numerous reporting requirements contained in HB 2 of 2005, pursuant to his "item veto" authority found in Article VI, section 10 of the Montana Constitution. Senator John Cobb, individually, challenged the Governor's item vetoes, arguing that the Governor could not veto the reporting requirements without simultaneously vetoing the appropriations associated with the reporting requirements. *Cobb v. Schweitzer*, 2006 Mont. Dist. LEXIS 892.

The district court upheld 32 of the Governor's 34 item vetoes at issue. *Id.* In deciding what matters are subject to the governor's item veto authority, the court adopted the test developed by the Iowa Supreme Court in *Rants v. Vilsack*, 684 N.W.2d 193, 206-07 (Iowa 2004). The court held that the governor's item veto authority extended to: "(1) a specific appropriation contained in the bill; (2) a condition that limits the use to which an appropriation may be put but only if the appropriation to which it is attached is vetoed as well; and (3) a rider." 2006 Mont. Dist. LEXIS 257, ¶ 29. The court defined a "rider" as "an unrelated substantive piece of legislation incorporated in the appropriation bill." 2006 Mont. Dist. LEXIS 892, ¶ 1, quoting *Rants*.

The court's ruling in *Cobb* is consistent with the Supreme Court's decision in *Davidson*. Where in *Davidson* the court found "incidental provisions of an appropriations bill" to be constitutionally permissible, the *Cobb* decision allows for the inclusion in a general appropriations bill of a "condition that limits the use to which an appropriation may be put." If the governor vetoes such a condition, he also must veto the appropriation upon which the condition is placed. This has been summarized elsewhere to mean that a general appropriations bill may include reasonable conditions, restrictions, or limitations on the expenditure of appropriated funds. *See* 63C Am. Jur.2d *Public Funds* § 39.

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The New Mexico Constitution combined into one section the three sections of the 1889 Montana Constitution implicated in *Davidson*. In its strong endorsement of the New Mexico holding, the *Davidson* court did not distinguish between the separate provisions.

“Riders” do not fall into the category of reasonable conditions, however. “Riders” are a proper subject for the governor’s item veto authority, because the constitution does not permit their inclusion in a general appropriations bill. Cobb did not appeal the district court decision.

Many other states in recent years have concluded that their state constitutional provisions limiting their general appropriations bills to appropriations, only, constitute outright prohibitions against the amendment of existing statutory law in a general appropriations bill. For example, in *Anderson v. Lamm*, 195 Colo. 437, 579 P.2d 620 (1978), the Colorado Supreme Court interpreted its constitutional restriction (virtually identical to Montana’s)<sup>3</sup> as follows: “This section has been interpreted to mean that, in the general appropriation bill, the general assembly may not include substantive legislation, nor may it amend or repeal a law.” *Id.* at 443, 579 P.2d at 624. Similarly, in *State ex rel. Coll v. Carruthers*, 107 N.M. 439, 759 P.2d 13480 (1988), the New Mexico Supreme Court interpreted its comparable constitutional provision<sup>4</sup> to mean: “Article IV, section 16 of the New Mexico Constitution prohibits the inclusion of general legislation in the General Appropriation Act. The General Appropriation Act may not be used as a vehicle by which to nullify general legislation.” In South Dakota, the state supreme court held: “Under the [constitutional language], this Court has held that ‘while the Legislature is free to impose conditions and restrictions on appropriated funds within the body of a general appropriations bill, it may not substantively legislate in that bill in a manner that changes, amends or repeals existing law.’” *Apa v. Butler*, 2001 SD 147, P9 (S.D. 2001) (citation omitted).<sup>5</sup> The court went on to explain:

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<sup>3</sup> The opinion quotes the provision as follows: “The general appropriation bill shall embrace nothing but appropriations for the expense of the executive, legislative and judicial departments of the state, state institutions, interest on the public debt and for public schools. All other appropriations shall be made by separate bills, each embracing but one subject.” Colo. Const. Art. V, sec. 32.

<sup>4</sup> The opinion quotes the provision as follows: “[g]eneral appropriation bills shall embrace nothing but appropriations for the expense of the executive, legislative and judiciary departments . . . . All other appropriations shall be made by separate bills.” N.M. Const. art. IV, § 16.

<sup>5</sup> The South Dakota constitution is almost identical to Montana’s, except that it contains a special provision for the “other appropriations” not contained in the general appropriations bill, which require a 2/3 vote for their approval. Article XII, section 2 of the South Dakota Constitution provides: “The general appropriation bill shall embrace nothing but appropriations for ordinary expenses of the executive, legislative and judicial departments of the state, the current expenses of state institutions, interest on the public debt, and for common schools. All other appropriations shall be made by separate bills, each embracing but one object, and shall require a two-thirds vote of all the members of each branch of the Legislature.” (emphasis added).

This Court has previously echoed the view that appropriations bills are administrative in nature, holding in *State ex rel. Oster v. Jorgenson*, 81 S.D. 447, 450, 136 N.W.2d 870, 872 (1965) that:

[a] general appropriation bill is not legislation in the true sense of the term. It is as its language implies "a setting apart of the funds necessary for the use and maintenance of the various departments of the state government already in existence and functioning. . . . In providing that it should embrace nothing else, the framers of the Constitution undoubtedly intended that members of the legislature should be free to vote on it knowing that appropriations and nothing else were involved." *Sellers v. Frohmiller*, 42 Ariz. 239, 24 P.2d 666.

These holdings regarding the limitations of what may be contained in a general appropriations bill are consistent with the prohibition found in the Montana Constitution, the rule articulated by the Montana Supreme Court in *Davidson*, and the analysis conducted by the district court in *Cobb v. Schweitzer*. Matters incidental to an appropriation, such as accounting measures or conditions expressing how the funds may be used, are permissible. Changes in substantive law, however, are not.

Montana statutory law is consistent with these constitutional rulings, as well. Mont. Code Ann. § 17-8-103(2), states: "A condition or limitation contained in an appropriation act shall govern the administration and expenditure of the appropriation until the appropriation has been expended for the purpose set forth in the act or until such condition or limitation is changed by a subsequent appropriation act. In no event does a condition or limitation contained in an appropriation act amend any other statute."

Applying these standards, first, to the introductory sections of HBs 804 through 809 (sections 1 through 5, addressing first level expenditures, establishing appropriation controls, and other similar provisions), it is my opinion that these incidental provisions for the expenditure and accounting of money are permitted under any standard that courts have employed, and under 17-8-103(2), cited in the preceding paragraph. These sections of the bills constitute incidental provisions for the expenditure and accounting for the money and do not violate the requirement that the general appropriations bills contain only appropriations.

The more difficult question is whether those sections of HBs 804 through 809 amending current statutes are permissible as "incidental" to the general appropriations bills, or, conversely, whether they are impermissible as substantive policy changes to existing law. On multiple occasions over the past sixteen years, the Montana legislature has enacted laws reflecting there will be one single

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The differences are not important for purposes of the quote from the *Ada* case explaining the prohibition on the inclusion of substantive law in a general appropriations bill.

general appropriations act. *See* attached list. These enactments indicate a legislative policy determination, reaffirmed many times over, that the appropriations to fund the “ordinary expenses” of state government will be made through the adoption of a singular general appropriations act. It is my opinion that the changes to this policy determination being proposed in HBs 804 through 809 by amending existing sections of the Montana code are substantive policy changes, not “incidental” changes that are permissible. Indeed, the tremendous controversy surrounding the changes, and the arguments set forth by the proponents of the changes, themselves, belie any argument that these changes are simply incidental and not substantive. It is my opinion that Article V, section 11(4) of the Montana Constitution prohibits the amendment of the sections of the Montana code containing the policy determination that has been repeatedly reaffirmed, that the legislature must fund the ordinary expenses of state government through one general appropriations act. While this or any future legislature can change this past policy determination, the change must come through passage of general legislation, not through a “rider” included in a general appropriations bill.

4. If they are not general appropriations bills, what constitutes a single subject?

Because I believe the multiple appropriations bills are general appropriations bills, I did not go on to explore the parameters of a “single subject” bill within the meaning of Article V, section 11(3) and (4) of the Montana Constitution.

AMENDMENTS TO MCA CONTAINED IN HBs 804 THROUGH 809

<u>MCA Section</u>	<u>Session Law</u>	<u>Term Amended In or Enacted</u>
15-1-122(5)	Ch. 574, L. 2001, sec. 3	“the general appropriations act”
17-1-507(3)	Ch. 509, L. 1995, sec. 19	“the general appropriations act for each biennium”
17-7-123	Ch. 347, L. 1997, sec. 10	“the general appropriations act” (two times) and “the budget bill”
17-7-131		“the legislature . . . may not amend the proposed budget bill so as to . . .”
17-7-138	Ch. 787, L. 1991, sec. 8; Ch. 8, Sp. L. July 1992, sec. 1; Ch. 347, L. 1997, sec. 13	“the general appropriations act” (seven times)
17-7-139	Ch. 255, L. 2001, sec. 3	“the general appropriations act”
17-7-140	Ch. 5, Sp. L. July 1992, sec. 1	“each general appropriations act”
17-7-301	Ch. 347, L. 1997, sec. 17	“the general appropriations act” (two times)
17-7-304	Ch. 23, Sp. L. Nov. 1993, sec. 8	“the general appropriations act”
20-9-542	Ch. 550, L. 2003, sec. 8	“a general appropriation act”
20-15-310	Ch. 495, L. 1981, sec. 2	“the state general appropriations act”
20-25-248	Ch. 362, L. 1997, sec. 1	“the general appropriations act”
52-2-710	Ch. 394, L. 2003, sec. 1	“the general appropriations act”
53-2-217	Ch. 595, L. 2005, sec. 19	“the general appropriations bill”
53-6-1020	Ch. 287, L. 2005, sec. 10	“”the general appropriations act”
90-4-614	Ch. 350, L. 1993, sec. 6	“the general appropriations act”

BILL TITLES OF A SAMPLING OF THE ABOVE-CITED SESSION LAWS

“AN ACT TO GENERALLY REVISE AND CLARIFY THE LAW RELATING TO APPROPRIATIONS. . . .”, Sec. 8, Ch. 787, L. 1991; “AN ACT IMPLEMENTING BUDGET REDUCTIONS...” Sec 1, Ch. 8, L. 1992 Sp. Sess; “AN ACT CLARIFYING THAT THE GOVERNOR HAS THE AUTHORITY TO DIRECT AGENCIES TO REDUCE SPENDING . . .” Sec. 1, Ch. 5, L. 1992, Sp. Sess.; “AN ACT PROVIDING FINANCIAL INCENTIVES TO STATE EMPLOYEES. . . .” Sec. 8, Ch. 23, L. 1993, Sp. Sess.; “AN ACT CLARIFYING THAT OPERATING BUDGETS AND FUND TRANSFERS MUST CONFORM TO CONDITIONS CONTAINED IN THE GENERAL APPROPRIATIONS ACT. . . .” Sec. 3, Ch. 255, L. 2001; “AN ACT GENERALLY REVISING STATE BUDGETING LAWS. . . .” Secs. 10, 13, and 17, Ch. 347, L. 1997. The list goes on and on.